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No. 84-1659

In the Supreme Court of the United States

October Term, 1984

STATE OF CONNECTICUT,

Petitioner,

v.

ALAN H. MARTIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this is a case which warrants the extraordinary relief of certification.

2. Whether there exist adequate, independent state grounds so as to preclude federal review.

3. Whether the State's good-faith claim should be barred as both untimely and inapposite.

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OPINIONS BELOW

The opinions below include not only those of the Connecticut Appellate Court and Connecticut Supreme Court noted in the State's Petition, but the opinion of the trial court (unreported), appended hereto. Respondent's App., at 1-16.

———o———

JURISDICTION

The judgment of the Connecticut Supreme Court denying the State's Petition for Certification to Appeal was entered on February 15, 1985. The petitioner's "Affidavit of Timely Filing" declares that its Petition for a Writ of Certiorari was mailed on April 19, 1985. Contrary to the provisions of Rule 20 of the Supreme Court Rules, the State's filing was not made within sixty days after entry of judgment. The case presented is not one where this Court should relax the requirements of Rule 20.3, because this is not a case in which the ends of justice require such an exception.

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STATEMENT OF THE CASE

The respondent, having been charged with possession of a narcotic substance and a controlled substance, filed a motion to suppress materials seized subsequent to a warrantless arrest and search. Following an evidentiary hearing and the submission of briefs, the trial court granted the respondent's motion to suppress and dismissed the

case, finding that the arrest that led to the seizure of the evidence was not supported by probable cause. Respondent's App., at 16.

The petitioner appealed to the Connecticut Appellate Court. The sole issue raised in its appeal was whether or not the trial court erred in its finding that there was no probable cause to justify the seizure and subsequent search of the respondent. Petitioner did not claim a good faith exception to the exclusionary rule, either in the trial court or upon appeal. *State v. Martin*, 2 Conn. App. 605, 606 n.2 (1984), Petitioner's App., at 2A-3A. It should also be noted that the petitioner specifically declined to claim such an exception during oral argument on the appeal, when a member of the appellate tribunal inquired whether that issue was being asserted.

After the Appellate Court affirmed the trial court's decision, the petitioner filed a motion to reargue, setting forth claims of law that it had not raised either in the trial court or on appeal. Its motion was granted in part and, after briefing, the Appellate Court reaffirmed its finding of no error on the appeal and issued a revised opinion. *State v. Martin*, 2 Conn. App. 605 (1984) (revised), Petitioner's App., at 13A-26A.

The good faith exception to the exclusionary rule which the petitioner now seeks to raise in this Court was asserted for the first time in its motion to reargue before the Connecticut Appellate Court, after that court had affirmed the trial court decision. *State v. Martin*, 2 Conn. App. at 612A, Petitioner's App., at 21A. The Connecticut Appellate Court did not pass upon that issue because petitioner failed to assert it, even when invited to do so. The Appellate Court stated:

> This case involves not a search pursuant to a search warrant but a warrantless search, which neither *United States v. Leon*, supra, nor *Massachusetts v. Sheppard*, supra, addresses. Moreover, the state did not claim in the trial court a good faith exception to the exclusionary rule for this warrantless search, as it could have. Cf. *United States v. Leon*, supra. Thus, there was no occasion for the trial court to make such an initial determination. Nor did the state claim such an exception in this court. . . .

Id. at 606-07 n.2, Petitioner's App., at 14A-15A.

Similarly, the petitioner also sought, through its motion to reargue, to raise for the first time the claim that the seizure in this case should have been reviewed by the standard of reasonable and articulable suspicion. The Appellate Court declined to reanalyze the case on the basis of that "belated claim." *State v. Martin*, 2 Conn. App. at 612A, Petitioner's App., at 21A. Among the several cogent reasons given, the court declared:

> Thus, the trial court was not alerted to the opportunity to make additional factual findings which might have been relevant to the claim, and we were thus deprived of those findings and of a reasonable analysis of them by the trial court . . . [W]hether there was, in any given set of circumstances, a reasonable articulable suspicion is in the first instance a question of fact for the trial court [citations omitted]; subject ordinarily to a limited scope of appellate review. [citations omitted]. Thus, it is particularly inappropriate for us to make such a determination after full briefing and argument which ignored that issue.

Id. at 612A-612B, Petitioner's App., at 21A-22A.

REASONS FOR DENYING THE WRIT

A. No Special and Important Reasons for Granting Writ.

For almost sixty years, this Court has adhered to the principle that, as a matter of judicial discretion, a review on writ of certiorari will be granted only when there are "special and important reasons therefor." Sup. Ct.R. 35(5), Revised Rules of the Supreme Court of the United States, adopted June 8, 1925, eff. July 1, 1925, now Sup. Ct.R. 17.1. Petitioner fails to demonstrate any such "special and important reasons" in its brief. Rather, its primary thrust is directed at an invention of its own which it has chosen to call "procedural default." It virtually ignores the *substance* of the trial court and two Appellate Court opinions declaring the seizure and search of the respondent to be illegal.

Petitioner's "procedural default" argument hardly rises to the level of "national importance" which is generally regarded as the cornerstone of any viable certiorari petition. 13 Moore's Federal Practice ¶817.41. Its argument is fraught with contradictions, claiming *inter alia:* that the state appellate courts should have excused and ignored petitioner's failure to identify its presently claimed ground to justify the conduct of the police; that the "ignorance" of the Connecticut State's Attorney who handled the suppression hearing and the oral argument on the appeal should neither "change the law" nor justify a "deliberate departure from it"; and that the Connecticut Appellate Court has "enlarged the scope of the Fourth Amendment" and failed to apply "proper" Fourth Amendment standards. Petition, at 9-11. The petitioner nevertheless concedes that state rules of practice requir-

ing that claims of law be clearly and distinctly raised in the trial court are important and desirable; that a court should not "abandon its judicial role" and assume the role of advocate; and that the "procedural rule" in question may well implicate the principle of appellate law that state court decisions which rest upon independent state grounds are not proper cases for review. Petition, at 14, 16, 17.

The petitioner's admissions of its own procedural failures may present an unusual case, but hardly one of "national importance." Its attack upon its own trial and appeal attorney ("advocates should know the law applicable to a claim" and "their ignorance neither changes the law nor justifies a deliberate departure from it", Petition, at 11), does not serve to make the case more compelling. The petitioner's charge that the Appellate Court enlarged the scope of the Fourth Amendment, on the one hand, and failed to apply its standards, on the other, is a contradiction in terms and unsupported in the record.

The facts of this case make clear that it is far removed from being a case of "national importance". Shorn of its rhetoric, the Petition presents the classic example of an unsuccessful party pursuing a multitude of appeals in the hope of finding a more hospitable forum. This Court has increasingly recognized the need to discourage unsuccessful litigants from pursuing endless appeals, and the present Petition is a paradigm of this regrettable pattern.

The Connecticut Appellate Court did not decide a question of substance that has not been determined by

this Court. It did not decide any issue in a manner that conflicts with a decision of the Connecticut Supreme Court, other state courts of last resort, or of this Court. Nor did it decide "an important question of federal law which has not been, but should be, settled by this Court, or . . . in a way in conflict with applicable decisions of this Court." Sup.Ct.R. 17.1(c).

In order to persuade this Court of the magnitude of the claimed error below, petitioner distorts both fact and law. The petitioner's claim that the Appellate Court "in effect enlarged the scope of the Fourth Amendment," Petition, at 10, is both misleading and incorrect. The Connecticut courts applied the appropriate Fourth Amendment standards to this case, and concluded that there was no probable cause for the seizure of the respondent or the subsequent search. That finding was responsive to the only issue that was raised at trial and on appeal. Petitioner makes a quantum leap from its attack upon the Appellate Court's refusal to consider its untimely theory of the case to the untenable claim that the court enlarged the scope of the Fourth Amendment. No such "enlargement" is discernible from that court's decision.

The petitioner's insistence that the Connecticut courts' findings of no probable cause were based on the subjective intent of the arresting officer is equally misleading and incorrect. The trial court opinion clearly reflects a careful evaluation of both the objective facts of this case and relevant constitutional law. Memorandum of Decision, at 4, 14-18, Respondent's App., at 3-4, 13-16. It did not rely on what the arresting officer said he intended to do, but what the police had done. *Id.* Similarly, the Appellate Court made clear that its decision to affirm was based

on the absence of sufficient "facts and circumstances within the officer's knowledge, and of which he ha[d] trustworthy information sufficient to justify the belief of a reasonable person that an offense ha[d] been or [was] being committed. . . ." *State v. Martin*, 2 Conn. App. at 612B, Petitioner's App. at 22A. It went on to analyze the extensive facts that had been found by the trial court, *id.* at 613-16, Petitioner's App. at 23A-26A, upon which facts it concluded that in this case "the search was based on less than probable cause." *Id.* at 616, Petitioner's App., at 26A. Thus, there is no merit to the petitioner's bald assertion that the finding of no probable cause in this case was founded on the subjective intent of the arresting officer.

The decisions below concerned one of the most ubiquitous issues in criminal law: whether a warrantless arrest and search was justifiable under constitutional principles. The facts presented are comparable to those decided by state and federal trial and appellate courts throughout the country in a myriad of cases. The Connecticut Appellate Court applied the totality of the circumstances test of *Illinois v. Gates,* 462 U.S. 213 (1983), and concluded that the trial court was correct in granting the defendant's motion to suppress. Its decision in this regard was carefully reasoned. It took into account all of the state's claims raised at trial, on appeal, and in its motion for reargument, except for the good-faith exception argument, which, as shown below, does not belong in this case. *See infra* at C.2.

A fair reading of the Petition leaves no doubt that the claims raised do not present new or unique issues, let alone questions of great public importance, but focus

primarily on the state's perception that an individual whom it has prejudged to be guilty has not been convicted. ("[A] criminal will go free. . . ." State's Petition, at 14).

B. Adequate, Independent State Grounds for the Decision Preclude Federal Review.

The respondent fully agrees with petitioner's recognition of the "importance of state rules and procedure, which ordinarily require that claims of law be distinctly raised in the trial court." Petition, at 14. In addition, respondent does not dispute the principle of law cited by petitioner, Petition, at 16n.7, that a party who has defaulted in complying with reasonable state procedural rules for raising a claim is, subject to exceptions not applicable here, barred from federal review of that claim. *Wainwright v. Sykes,* 433 U.S. 72 (1976); *Henry v. Mississippi,* 379 U.S. 433 (1965).

The petitioner's particular default in this case is precisely of the sort that precludes federal review, as there is no question that there is a legitimate state interest in requiring litigants to raise their claims timely. "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as in civil cases by the failure to make timely assertion of the right." *Yakus v. United States,* 321 U.S. 414, 444 (1944). In a criminal case, the state's failure to assert a particular federal claim properly and timely is to be treated no differently than the failure of a defendant

to do so. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 2323 (1983).

This Court recently had occasion to confirm the principle that "the State's interest in the integrity of its rules and proceedings and the finality of its judgments . . . would be undermined if the federal courts were too free to ignore procedural forfeitures in state court." *Reed v. Ross,* 468 U.S. —, 104 S.Ct. 2901, 2907 (1984). In that case, the question presented was whether Ross's right to relief under *Mullaney v. Wilbur,* 421 U.S. 684 (1975) and *Hankerson v. North Carolina,* 432 U.S. 233 (1977) was forfeited by his attorney's failure, several years before those cases were decided, to claim either at trial or on appeal the unconstitutionality of the jury instruction on the burden of proof.

While Ross's claim arose within the context of federal habeas corpus, its reasoning is no less applicable to a case on direct appeal from the state court. This Court concluded in *Ross* that the failure of counsel to raise a constitutional issue in accordance with applicable state procedures can only be excused on the basis of "novelty" of the issue at the time of the state court proceeding. At the same time, the majority opinion declares:

> Underlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, *Wainwright v. Sykes,*

> 433 U.S., at 91, and n. 14 . . .; *Henry v. Mississippi*, 379 U.S. 443, 451 (1965) . . .; and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct. *Wainwright v. Sykes, supra*, at 89-90 . . .; *Engle v. Isaac, supra*, at 130. . . . A defense attorney, therefore, may not ignore a State's procedural rule in the expectation that his client's constitutional claim can be raised at a later date in federal court. *Wainwright v. Sykes, supra*, at 89 . . .; *Engle v. Isaac, supra*, at 128-129. . . . (alternate citations omitted).

Reed v. Ross, 104 S.Ct. at 2909.

In this case, the petitioner's belated claims are hardly "novel." When the motion to suppress was heard and briefed, the articulable suspicion rule had long since been adopted by this Court and applied in the Connecticut courts as well. The good-faith issue, even were it applicable, which it is not (*see infra* at C.2), had been raised in this Court, in the *Gates* case. Moreover, the good-faith exception to the exclusionary rule had been adopted en banc by the Fifth Circuit Court of Appeals, as early as 1980. *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). In fact the good-faith doctrine was a raging issue in the legal community by the time this case was tried and briefed. Thus, unlike the defendant's attorney in *Ross*, the State's attorney in this case asserts no novel constitutional principles. Its procedural defaults, therefore, cannot be excused.

It is well settled that states may determine when federal constitutional issues must first be raised in the state

courts, so long as a litigant is given a fair and reasonable opportunity to raise his claim. "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia,* 349 U.S. 375, 382 (1955). For example, in *Herndon v. Georgia,* 295 U.S. 441 (1935), *reh. den.,* 296 U.S. 661, the petitioner had filed a petition for rehearing in the Georgia Supreme Court, in which he attempted to raise a particular federal question for the first time. This Court stated: "The federal question was never properly presented to the state supreme court unless upon motion for the rehearing; and that court then refused to consider it. The long established rule is that the attempt to raise a federal question after judgment, upon a petition for a rehearing, comes too late, unless the court actually entertains the question and decides it." *Id.* at 443. In addition, the belatedly raised issue in *Herndon* involved, as here, a ruling of law that had been made while that case was pending decision. *Herndon* is thus on all fours with this case, and its ruling which barred federal review of a claim raised for the first time in a petition for rehearing, after judgment, requires the same result here.

Moreover, here as in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983), the "not pressed or passed upon" rule and the various considerations which underlie it, 103 S.Ct. at 2322-23, militate strongly against this Court's review of an issue that was not properly or timely presented to the Connecticut courts which, accordingly, did not address it. 103 S.Ct. at 2321.

The petitioner concededly defaulted in complying with legitimate state procedural rules[1] for raising the claims it now asks this Court to determine. Under well established principles of federal law, the petitioner is barred from federal review of those claims.

C. Good-Faith Exception Argument Is Untimely and Inapposite.

Petitioner claims that the good-faith exception to the exclusionary rule should be applied to the facts of this case. *See, United States v. Leon,* — U.S. —, 104 S.Ct. 3405 (1984). That clear departure from prior Fourth Amendment law has no place in this case for two reasons: (1) the State not only failed to raise this claim both at trial and on appeal, but expressly waived any such claim during oral argument before the Appellate Court; and (2) the *Leon* rule has no application to the warrantless case here at issue.

1. Untimeliness and Waiver.

The Appellate Court correctly declined to disturb its original decision to consider the *Leon* issue, on the grounds that the State's claim was untimely. *State v. Martin,* 2 Conn. App. 605, 612A (1984), Petitioner's App., at 21A. The court reasoned that, in the first place, the petitioner did not follow the mandate of the Connecticut Practice Book, Sec. 285A, Respondent's App., at 18, which requires that claims of law be distinctly stated to the trial

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1. The various pertinent state rules with which petitioner failed to comply are set forth in Respondent's App., at 18-21, and discussed, *infra* at C.1.

court, and provides that, where this is not done, "it will not be the duty of either the trial court or the appellate court to decide the claim." *Id.* In the second place, it noted, the State failed to follow the requirements of Secs. 3012 and 3060F of the Connecticut Practice Book, Respondent's App., at 20-21, in that it neither claimed the *Leon* issue in its preliminary statement of issues on the appeal, nor briefed it. *Id.*

Furthermore, Sec. 3063 of the Connecticut Supreme Court Rules, applicable to the Appellate Court by Sec. 2000 of the Rules of the Appellate Court, Respondent's App., at 21, 19, similarly declares:

> The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . .

Finally, in the course of its oral argument before the Appellate Court, the petitioner expressly conceded that it was not claiming the good-faith exception as a basis for reversal. *See, State v. Martin,* 2 Conn. App. at 606-07 n.2, Petitioner's App., at 14A-15A.

Clearly, neither the trial court nor the Appellate Court was obliged, as petitioner suggests, to consider issues of law not called to its attention. To the contrary, for a party to forego arguments and bypass issues only to raise them after an adverse decision subverts generally accepted procedures and rules of trial and appeal, and flies in the face of pertinent case law, fundamental fairness, and public policy. *See,* e.g. *Wainwright v. Sykes,* 433 U.S. at 89-90.

2. The good-faith exception is totally inapplicable to this case.

This is a warrantless arrest and search case. *Leon* simply does not address such a case. The Appellate Court, therefore, correctly chose to ignore the *Leon* issue, and decided the case (twice) on the "current state of constitutional law." *State v. Martin*, 2 Conn. App. at 606-07 n.2, Petitioner's App., at 14A-15A.

There is nothing in the *Leon* decision to suggest that it applies to warrantless searches and/or arrests. Quite the opposite, the majority opinion emphasizes at length the role of the magistrate in the warrant process, stressing that its modification of the Fourth Amendment exclusionary rule rests on its belief that the deterrent aspect of that rule is not compelling in cases involving warrants issued by a "detached and neutral magistrate." *United States v. Leon*, 104 S.Ct. 3405, 3416 (1984). The court points out that:

> Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.

Id. at 3418.

On the other hand, *Leon* also reaffirms that the exclusionary rule is "designed to deter police misconduct . . .," *id.* at 3418, and does contribute to deterrence of Fourth Amendment violations by penalizing the officers who violate its strictures. *Id.* at 3420.

Clearly, the good-faith doctrine was carefully limited to cases involving warrants, and, therefore, has no

bearing upon a case such as this, where a tip from an anonymous informer led directly to a warrantless arrest.

The petitioner urges this Court both to modify existing constitutional law by expanding the application of the good-faith defense to this non-warrant case, and to overlook petitioner's failure to assert this federal claim as required under Connecticut law. To do so would offend the very considerations that led this Court to employ the "not pressed or passed upon rule" in *Gates,* when it declined to decide the good-faith issue in that case. *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983). Here, as in that case, the record contains little, if anything, regarding the subjective good faith of the arresting officers. 103 S.Ct. at 2323. Here, as in that case, " 'due regard for the appropriate relationship of this Court to state courts' [citation omitted] demands that those courts be given an opportunity to consider the constitutionality of the action of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions." *Id.* "Finally, by requiring that the State first argue to the state courts that the federal exclusionary rule should be modified, [this Court] permit[s] a state court, even it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id.*

Because the application of *Leon* to this case would constitute a substantial departure from existing Fourth Amendment principles, this Court should, as in *Gates,* refuse to pass upon the good-faith defense proposed by

the petitioner, it having failed to raise that claim at an appropriate time in the state court proceedings.

Since, as demonstrated, *Leon* is totally inapposite to the case at bar, it is respondent's position that this Court need not reach the issue of its retroactivity.

Petitioner further claims that "a simple good-faith mistake in the determination of probable cause is a question that would be answered on any remand," and that there is "no need for further trial court findings." (Petition, 23n.9, 24.) As has been stressed in this brief, petitioner never alerted the trial court or opposing counsel to the fact that it was claiming a good-faith exception to the exclusionary rule. No facts were found on this issue. No determination was made. The record is totally inadequate to support any meaningful finding as to the officers' good faith, one way or the other. Thus, a remand to the Connecticut Appellate Court as requested by the petitioner, Petition, at 24, would serve no valid purpose.

D. CONCLUSION

This case is not a case of national importance, and it possesses none of the criteria that militate in favor of the extraordinary relief of certification. The decision of the Connecticut Appellate Court rests on adequate and independent state grounds, thereby precluding federal review of the federal claim that petitioner now seeks to raise. Moreover, those claims were not timely and properly raised, and are not well-founded.

For all of these reasons, the State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Respondent

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Dated: May 16, 1985

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

APPENDIX OF THE RESPONDENT

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STATE OF CONNECTICUT SUPERIOR COURT
V. JUDICIAL DISTRICT OF DANBURY
ALAN MARTIN JUNE 1, 1983

MEMORANDUM OF DECISION

DEFENDANT'S MOTION TO SUPPRESS

The following facts are found by the court:

On August 26, 1981 at approximately 10:30 P.M. Lieutenant Dennis Cooney, the desk officer at Danbury Police Headquarters, answered a phone call and was told by what he believed was a white male that "there is a blue Corvette out-of-state plate that will be going to the Foundry in about twenty (20) minutes to deal in a large amount of cocaine."[1] This caller never identified himself and the voice was unknown to Lieutenant Cooney. In response to this information, Lieutenant Cooney put out a radio call for Detective Merullo to contact him by telephone.

Detective Merullo on this date was a member of the Danbury Police Department for thirteen and one-half (13½) years. He had worked with the Special Investigation Unit of the Danbury Police Department involved in narcotic investigations and was assigned for the past

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1. The quote from the police report was "Lieutenant Cooney, desk officer, advised Detective Merullo of the Detective Bureau Special Investigation Division that he, Cooney, had just received a phone call from an unknown male who reported that within twenty minutes, a blue Corvette would arrive at the Foundry Cafe on Route 7 and that a large amount of cocaine would be sold from the vehicle."

year to the State Wide Narcotic Task Force. Merullo called Lieutenant Cooney on the telephone located at the rear of police headquarters and was informed of the unidentified caller's message. Along with Detective Hull, he used his own personal vehicle (Gremlin) and proceeded to the Foundry Cafe on Route 7. This trip from headquarters to the Foundry Cafe took approximately five (5) minutes. Upon arriving, Merullo checked the parking lot for a blue Corvette and found none. He parked his vehicle so that he could observe the Foundry and the entrance to the parking lot. Approximately ten (10) minutes later, he observed a blue Corvette enter the parking lot and park under two flood lights attached to the Foundry Cafe building which were located about ten (10) feet from a walkway which was the entrance to the Foundry Cafe and stores which are located on the second floor. The area in which the blue Corvette parked was well illuminated. Detective Merullo telephoned the Danbury Police Department to check ownership and determine if there was any outstanding warrants on the Corvette with New Hampshire plates. He also requested that Lieutenant Cooney contact Sergeant McNamara and Detective Chapman of the Special Investigation Unit.

Merullo observed exiting from the Corvette a fairly tall white blond female from the passenger side. The operator exiting was a tall white male. Both went into the covered walkway and Merullo assumed they were heading for the cafe. Approximately fifteen (15) minutes later, the white male operator exited the covered walkway and was accompanied by another male. Merullo did not recognize the new male as he exited the covered walkway, but did recognize him as he was entering the passenger

side of the blue Corvette as Dominic Cristello. Merullo did not observe anything suspicious about the behavior of either individual at this time. Within a few minutes after the males entered the Corvette, which had tinted windows so that one could not see from the outside into the interior of the car, the vehicle was driven to another area and parked. This area had no illumination and Merullo had to move his vehicle in order to keep it in view.

The operator of the Corvette was unknown to Merullo but he recognized the male passenger as being Dominic Cristello, a person who had been involved in a drug conviction. This knowledge came to him during conversations with fellow police officers who were discussing the Foundry Cafe concerning drug traffic and informed him that Cristello was a frequenter of the Foundry Cafe and had been previously convicted of a drug charge eight (8) years before. He pulled Cristello's file and reviewed it.

Upon Sergeant McNamara's and Detective Chapman's arrival on the scene, Detective Merullo explained everything that had occurred up to the time of their appearance. He informed Sergeant McNamara that he believed he had probable cause to search the Corvette and it was his intention to make a search. It was agreed Sergeant McNamara would also drive his vehicle to the area where the Corvette was parked. Merullo drove his Gremlin up to the Corvette and parked directly behind it. Sergeant McNamara proceeded to go by the Corvette and stopped in front of the Corvette so that in effect the vehicle was boxed in. Merullo immediately exited his vehicle and proceeded to the Corvette to proceed with the search

believing he had probable cause to do so. He approached the driver's side of the Corvette badge in hand and identified himself as a police officer. He then requested the car's window be rolled down and it was rolled down partially. He then asked the operator for his license and registration. For his own protection, because he could not see the inside of the vehicle due to the tinted glass, he pulled open the vehicle door. Upon doing so the interior light was put on. Merullo stood by the car door and observed the operator trying to find his registration. It was at this point Merullo observed a small amber bottle with a small spoon on the top in the operator's hand being laid on the floor between his legs. It was Merullo's knowledge that it was common practice to carry cocaine in such a vessel and use the spoon for snorting. At this point, Merullo advised the operator he was under arrest and then after a period of five (5) minutes the officers searched the vehicle. Discovered in the back of the vehicle was an overnight bag and a paper bag. The paper bag contained a plastic bag with cocaine. The brown bag contained U.S. currency.

The defendant in his motion to suppress raises the following claims of law:

1. The tip that gave rise to the seizure of the defendant was patently unreliable and must therefore be treated as though it never occurred.

2. The defendant was "seized" within the meaning of the Fourth Amendment when the detectives approached his car.

3. The seizure of the defendant was patently unlawful.

4. The arrest of the defendant was made without probable cause.

As to the first claim of law, the defendant argues that because the tip that gave rise to the seizure of the defendant was from an anonymous informer, it must be carefully scrutinized and its degree of reliability ascertained. The informer being anonymous could not infer any reliability to the tip. The content of the tip was limited to the following: "There is a blue Corvette out-of-state plate, that will be going to the Foundry in about twenty minutes to deal in a large amount of cocaine."

The defendant argues that the informer did not identify the car by plate number, year, condition or shade of blue; did not identify the name of the owner or driver; or even indicate if a woman or a man old or young would be driving the car. He did not indicate if there would be a passenger in the car or where the sale of cocaine would take place. Nor did the informer give a single fact establishing the source of his information or indicating that he spoke from personal knowledge.

The defendant further argues that the guidelines for determining the reliability information received from an unidentified informant from *Spinelli v. United States,* 393 U.S. 410, 89 S. Ct. 584 (1969), which implements *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509 (1964). *Aguilar* teaches that the reliability of information received from an unidentified informant must be tested against facts demonstrating both (1) the informants' basis of knowledge and (2) that the informant is credible. *Aguilar,* supra, 114. Under *Spinelli,* it is permissible to add cor-

roboration to the probable cause assessment. *Spinelli,* supra, 415-417. *Spinelli* cautions, however, that "the tip even when certain parts of it have been corroborated by independent sources, (must be) as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration." *Spinelli,* supra, 415. Although *Aguilar* and *Spinelli* were warrant cases, their standards are applicable to non-warrant cases. See, e.g., *State v. Penland,* 174 Conn. 153 (1978); *United States v. Smith,* 598 F. 2d 936 (5th Circuit 1979). *Cf. Spinelli,* supra, 416 n. 5. Indeed, a greater measure of reliability is necessary where the police have acted without a warrant. As stated in *Aguilar:*

> "'(T)he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' *United States v. Lefkowitz,* 285 U.S. 452, 464 . . . the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.' "

In the instant case the defendant argues that it meets neither of the *Aguilar* requirements. The informer gave no circumstances on which he based his tip, and, since he did not identify himself, the police could draw no conclusions as to his credibility.

A tip from an unknown informant is presumptively unreliable. As the informer is not known personally, it cannot be shown that he has provided reliable information in the past; see e.g., *Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329 (1959); he cannot be said to be making a declaration against penal interests; see e.g., *State v. Ferguson,* — Conn. —, 43 Conn. L.J. No. 4, page 21; nor

is he available and therefore subject to arrest for false complaint. *Adams v. Williams,* 407 U.S. 143 (1972). *Cf. Jones v. United States,* 362 U.S. 257 (1960); *People v. Taggart,* 20 N.Y. 2d 335, 283 N.Y.S. 2d 1 (1967). Using anonymous information as a basis for intrusion police action is highly dangerous and such action should not be undertaken for the enforcement of sumptuary laws, such as gambling and the laws of limited public conveniences, such as narcotic violations. *Commonwealth v. Cruse,* 236 Pa. Super. 85, 344 A.2d 532, 535 (1975). (A tip from an anonymous source that persons in a certain car were armed and about to sell drugs "was completely lacking any indicia of reliability.")

If the tip in this case had no indicia of reliability for purposes of the credibility prong of *Aguilar,* it could pass the *Aguilar-Spinelli* requirements only if it contained extensive detail of the source of the informant's knowledge and was significantly corroborated. "Where the informer remains anonymous and as a result law enforcement officials have no idea whether he is credible there must be a strong showing of underlying circumstances that reveal the informer's source and significant corroboration of the tip." *United States v. Smith,* supra, 940.

For the type and amount of detail needed to satisfy the *Aguilar* basis of knowledge tests, Spinelli points to *Draper v. United States,* supra, as a "suitable benchmark." *Spinelli,* supra, 416-17. The tip that was found reliable in *Draper* had come from a paid "special employee" who not only was known, but also had a history of providing information that "had always been found accurate and reliable. . . ." *Draper,* supra, 313. Yet the court carefully assessed the content of the tip, finding that it was

reliable because it contained extensive detail. There, the tip included the exact physical attributes of the suspect (height, weight, age, race, complexion), the precise clothing he would be wearing and the suspect's immediate prior whereabouts. *Draper,* supra, 313.

The defendant argues that when compared to the detail of the information provided there *by a reliable informer,* the bare details in the tip herein are glaringly insufficient. Absolutely no facts were provided which indicated the source of the informant's information or from which it could reasonably be inferred that the informer spoke from personal knowledge. Indeed, absolutely no facts were provided concerning the suspect, not even the gender, let alone the detailed description would be proper under a *Spinelli-Draper* assessment. The tip in this case contained no "indicia of reliability," with regard to either prong of the *Aguilar* test. Here, as in *Aguilar,* there is no more than the " 'mere conclusion' that the defendant (possessed narcotics). . . . For all that appears the source merely suspected, believed or concluded that there was narcotics in the (defendant's) possession." *Aguilar,* supra, 113-114.

The standard to be used in determining whether a tip contains adequate detail to infer direct knowledge on the part of an informant "must be a stringent one, for only by adhering to the essential demands of the *Aguilar* tests can we avoid eviscerating the Fourth Amendment requirements of probable cause." *United States v. Bush,* 647 F. 2d 357, 364 (3rd Cir. 1981). This tip the defendant claims clearly fails that test. Further, the defendant claims it is precisely the type of tip referred to in *Adams*

v. Williams, supra, 147, where the court (Rehnquist, J.) said: "Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forceable stop of a suspect would be authorized." The defendant argues that this is clearly a tip so lacking in reliability that it can provide no legality to the seizure of the defendant.

Nor, the defendant claims, can it be maintained that this totally unreliable report received validation by corroboration. "Certainly, more than the corroboration of a few minor elements of the story is necessary (to demonstrate the informer's voracity), especially if those elements involve non-suspect behavior." *United States v. Bush,* supra, 363. "(C)orroboration is the word of innocent details of a tip is insufficient to establish a reasonable suspicion, much less probable cause." *United States v. Rasor,* 599 F. 2d 1330, 1332 (5th Cir. 1979).

The State admits, as it must, that a tip from an anonymous phone caller does not meet the two pronged test of credibility and reliability required for an arrest or search warrant under the *Aguilar* standard. *Aguilar v. Texas,* supra. The State argues that even with an anonymous tip the Court should analyze "the weight of the tip in a situation where the tip clearly was not up to *Aguilar* standards. *Draper v. United States,* supra; *Spinelli v. United States,* supra. The State argues that these cases suggest that strong factual corroboration could cure *Aguilar* deficiencies. The factual corroboration was the appearance of a blue Corvette within the twenty (20) minute span at the Foundry Cafe with out-of-state license plates. All of these facts the State admits were "inno-

cent-seeming" but when Merullo observed Cristello enter the car, the car being moved to a dark area, it claims that Merullo having knowledge of Cristello from a fellow police officer as having been convicted of a drug charge, and that he had been informed that Cristello hung around the Foundry—this now gave him corroboration of the key fact that drugs would be sold from the car. At this point the State argues that Merullo had a particularized, reasonable basis for approaching the car. The State then suggests that Merullo's purpose in approaching the car was "to further investigate," to determine the operator's identity and that he opened the car door out of concern for his personal safety.

The Court has already found as a fact that Merullo informed his sergeant that he had probable cause to search the defendant's vehicle and the move by the cars to block the Corvette is corroboration of this intent. Merullo testified that it was not his intention to make an arrest, only to search the car.

The State contends that even if Merullo's intent was to conduct a search, as opposed to making an investigatory stop, his actions were reasonable and based upon probable cause arising from the facts he observed.

> "A greater showing of the reliability of an informant's statement is necessary to support probable cause for a search than is needed to support the reasonable, or founded, suspicion which is a prerequisite for a valid stop. Compare *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) (probable cause for search), with *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), *Adams*

> *v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972), and *United States v. Avalos-Ochoa*, 557 F. 2d 1299 (9th Cir.), cert. denied, 434 U.S. 974, 98 S.Ct. 532, 54 L.Ed. 2d 466 (1977) (founded suspicion for stop). Although it is not certain how much less demanding the test of reliability is where only reasonable suspicion is required, the Supreme Court has said that "(s)ome tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized." *Adams v. Williams*, 407 U.S. at 147, 92 S.Ct. at 1924." *United States v. Sierra-Hernandez*, 581 F II 760 (1978).

Indeed, a *greater* measure of reliability is necessary where the police have acted without a warrant. As stated in *Aguilar:*

> " '(T)he informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests.' *United States v. Lefkowitz*, 285 U.S. 452, 464 . . . the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant'. . . . "

Aguilar, supra, at 110-11.

Certainly more than the corroboration of a few minor elements of the story is necessary (to demonstrate the informer's veracity), especially if those elements involve non-suspect behavior." *United States v. Bush*, supra, 363. (C)orroboration of innocent details of a tip is insufficient to establish reasonable suspicion, much less probable cause." *United States v. Rasor*, supra, 1332.

The Rasor case is notable, in that its facts are quite similar to the instant case. There, the anonymous caller told an immigration inspector that a certain vehicle contained an unknown quantity of marijuana. The informer gave the license number and exact location of the vehicle. The police conducted a further investigation and ascertained the name of the owner, the fact that he had previously been arrested for heroin possession, and that he used the vehicle to travel between Chicago and the Mexican/Texas border. They also observed, precisely as in the case at bar, the defendant move the vehicle from one parking space to another. Despite the greater detail given by the informer, and despite the incriminating information subsequently learned about him, the court held that there was no probable cause for the issuance of a warrant; there was nothing suspicious in the defendant's behavior in moving his vehicle and not even the subsequently acquired knowledge plus "the bald assertion of the anonymous informant could warrant a person of reasonable caution in the belief that the vehicle contained marijuana." *Id.*

In this case, the defendant argues there was no such corroboration or indicia of responsibility as required to make the seizure of the defendant legal. See, e.g., *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971). The tip from the anonymous informer in *Whitely* contained not only a more detailed description of the vehicle, including year, shade of color, and partial license number, but also the names and detailed physical descriptions of the occupants. Even with the extensively greater detail of that tip, the court held that the stop of the vehicle and the ensuing arrest and search were un-

reasonable, explaining that the "very most the additional information tended to establish" was that the informant had accurately described the vehicle and its occupants, but that such corroboration would not "support either the reliability of the informant or the informant's conclusion that those men were connected with crime." *Id.* 567. Clearly, the defendant claims the action of the police in this case has greatly less validity than that found invalid in *Whiteley.*

The defendant notes that the State of Connecticut relies heavily on the decision in *Adams v. Williams,* supra. In *Adams* an investigatory stop was upheld where an informer was personally known to the investigating officer, was subject to arrest for making a false complaint and had provided reliable information in the past; the court noted with particularity that "this is a stronger case than obtains in the case of an anonymous telephone tip." 407 U.S. 146. Thus, the *Adams* case lends support to the defendant's position that the seizure of his person and the search of his vehicle were unconstitutional.

The next issue presented is whether the defendant was "seized" within the meaning of the Fourth Amendment.

A person is "seized" within the meaning of the Fourth Amendment, only when, by means of a show of authority or the exercise of physical force, his freedom or liberty of movement is restrained to a degree that a reasonable individual, in view of all the surrounding circumstances, would conclude that he is not free to leave, or to disregard any questions put to him. *United States v. Mendenhall,* 446 U.S. 544, 553-54 (1980) (plurality opin-

ion); *State v. Ostroski,* 186 Conn. 287, 291-92 (1982). Ultimately, the determination of whether there has been such a seizure is an issue of fact. *State v. Ostroski,* supra, 292.

In the instant case, the defendant was seized when the police "boxed in" his car with theirs. Clearly, he was not free to leave. The police intended to search his car. With the Corvette in a stationary position between two unmarked police vehicles, four officers approached the defendant, pretextually, asked for his license and registration. As expressed in *United States v. PenaCantu,* 639 F.2d 1228 (5th Cir. 1981), "a reasonable driver would not feel free to ignore a situation in which several agents pull up directly behind his stationary car, position themselves on both the driver and passenger sides of the vehicle, and proceed to question him." *Id.* at 1229. See also *United States v. Beck,* 602 F.2d 726, 728 (5th Cir. 1979) (when police "interrupted their patrol by pulling alongside the parked Chevrolet, they clearly took the sort of action contemplated by Terry.").

In this case, the record is devoid of any information indicating that the police suspected an irregularity in the defendant's license or registration. Thus, the seizure effected when the detectives approached the defendant's car was unreasonable unless the police, as the State contends, had probable cause to conduct a search within the meaning of the Fourth Amendment.

In the absence of certain recognized and well-delineated exceptions, the Fourth Amendment requires that a search and seizure conducted in an area where the individual has a justifiable expectation of privacy, must be

both reasonable and conducted under authority of a valid warrant. See *State v. Johnson,* — Conn. —, 42 Conn. L.J. No. 35, pp. 1, 3 (February 24, 1981); *State v. Kolinsky,* — Conn. —, 42 Conn. L.J. No. 26, pp. 6, 8 (December 23, 1980), *cert. denied,* 451 U.S. 973 (1981); *State v. DeChamplain,* 179 Conn. 522, 527 (1980); *State v. Federici,* 179 Conn. 46, 51-52 (1979). Otherwise, they will be condemned as unreasonable. *State v. Januszewski,* 182 Conn. 142, 151-52 (1980), *cert. denied,* 101 S.Ct. 3159 (1981).

In determining the reasonableness of police conduct under the Fourth Amendment, the courts will balance the need to search or seize against the invasion resulting from such activity. The test to be applied, which is objective in nature, is whether the facts available to the officer at the moment of the search or seizure warrant a man of reasonable prudence and caution to believe that the action taken was appropriate. Thus, to justify a particular intrusion, the police must be able to demonstrate specific and articulable fact which, taken together with rational inferences from those facts, reasonably warrant the action taken. *State v. Januszewski,* supra, 148-49, *cert. denied,* 101 S.Ct. 3159 (1981).

The defendant in this case was seized when the police officers drove up, surrounded him with their cars. The seizure was valid only if made with probable cause. *State v. Federici,* 179 Conn. 46, 55 n.5 (1979).

Probable cause exists only when "the facts and circumstances within the knowledge of the officer and of which he has *reasonably trustworthy* information are sufficient in themselves to warrant a man of reasonable caution to believe that a felony has been committed," *State*

v. Wilson, 178 Conn. 427, 436 (1979) (emphasis added), and that the person seized committed it. *State v. DeChamplain,* supra, 529. "Probable cause means more than a mere suspicion." *State v. Penland,* supra, 155.

In *State v. DeChamplain,* supra, Justice Speziale, now our Chief Justice, noted in a footnote at page 529 that, "Although the precise determinations differ when probable cause to *search and seize* is at issue as opposed to probable cause to *arrest* '(i)t is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search.' 1 La Fave, Search & Seizure: A treatise on the Fourth Amendment (1978) Sec. 3.1(b), p. 441; see *Chambers v. Maroney,* 399 U.S. 42, 47, 90 S.Ct. 1975, . . . (1970); *Ker v. California,* 374 U.S. 23, 41-43, 83 S.Ct. 1623 . . . (1963); *Johnson v. United States,* 333 U.S. 10, 15, 68 S.Ct. 367 . . . (1948). *State v. Federici,* 179 Conn. 46, 55 n. 5, . . . (1979)."

The court finds that:

1. The tip from the unnamed informer was patently unreliable and therefore is to be treated as if it never existed.

2. The defendant was "seized" within the meaning of the Fourth Amendment to the Constitution when the detectives boxed his car and approached him.

3. This seizure of the defendant was unlawful.

4. The arrest of the defendant was made without probable cause.

The Motion to Suppress is granted.

/s/ McGrath, J.

STATE OF CONNECTICUT
SUPERIOR COURT

Judicial District of Danbury

No. CR 3-41149a

STATE OF CONNECTICUT

vs.

ALAN MARTIN

I, Therese A. Servas, Clerk of the Superior Court for the Judicial District of Danbury, hereby certify that the within and foregoing is a true copy of the original MEMORANDUM OF DECISION DEFENDANT'S MOTION TO SUPPRESS DATED JUNE 1, 1983, in said cause, as on file and of record appears.

In witness whereof, I have hereunto set my hand and the Seal of said Court at Danbury in said Judicial District, this 28th day of OCTOBER, 1983.

Therese A. Servas, Clerk

Connecticut Practice Book, Sec. 285A. Trial Briefs; Claims of Law

The parties may, as of right, or shall, if the court so orders, file, at such time as the court shall determine, written trial briefs discussing the issues in the case and the factual or legal basis upon which they ought to be resolved.

If a party intends to raise any claim of law which may be the subject of an appeal, he must either state the same distinctly to the court before his argument is closed or state it in a written trial brief. If this is not done, it will not be the duty of either the trial court or the appellate court to decide the claim.

Connecticut Practice Book, Sec. 2000. Applicable Sections of Supreme Court Rules

The practice and procedure for appeals to the appellate court shall conform to the rules of practice governing appeals to the supreme court except where a particular practice or procedure is specified by the rules of the appellate court. With the exception of printed briefs and records, all forms and filings specified for use in appeals to the supreme court shall be used in all appeals to the appellate court.

Appeals from any final judgment of a trial court which by statute may be taken to the appellate court only by certification by that court upon petition by an aggrieved party shall conform to the supreme court rules concerning appeals by certification, so far as they are applicable, except where a particular practice or procedure is specified by the rules of the appellate court.

Connecticut Practice Book, Sec. 3012. Papers To Be Filed [By Appellant and Appellee] on Issues, Record and Transcript

The appellant shall send, as set forth in Sec. 3013, to the chief clerk of the supreme court at the same time the appellant sends him a copy of the appeal:

(a) A preliminary statement of the issues intended for presentation on appeal. If the appellee wishes to present for review alternate grounds upon which the judgment may be affirmed, or if he wishes to present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial, [or if he wishes to claim that a new trial rather than a directed judgment should be ordered if appellant is successful on the appeal,] he may file a preliminary statement of issues within fourteen days from the filing of the appeal.

* * *

Note: Bracketed portions became effective on January 1, 1985 and have no bearing on this case.

Connecticut Practice Book, Sec. 3060F. (Formerly Sec. 3054). Appellant's Brief; Form

The appellant's brief shall contain the following:

(a) A concise statement setting forth, in separately numbered paragraphs, without detail or discussion, the principal issue or issues involved in the appeal, the appropriate references to the page or pages of the brief where the issue is discussed, pursuant to subsection (d) hereof. . . . The court may refuse to receive a brief not complying with this requirement.

* * *

Connecticut Practice Book, Sec. 3063. Errors Considered

The supreme court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The supreme court may in the interests of justice notice plain error not brought to the attention of the trial court.